Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

FLORENCIO P. SAUCEDA,
Petitioner,

v.

CITY OF DEL RIO,
by and through its City Council,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether due process interests are implicated when a governmental body unilaterally conducts a good cause termination hearing for an at-will employee.

Whether a governmental body violates the Due Process Clause of the Fifth and Fourteenth Amendments when it makes a good cause determination to terminate a public employee, where the employee has a contractual right for the good cause determination to be made by a neutral, independent hearing officer.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

1. FLORENCIO P. SAUCEDA, Petitioner

2. CITY OF DEL RIO, by and through its City Council, Respondent

Pursuant to Supreme Court Rule 29.6, Petitioner states that he has no parent companies or non-wholly-owned subsidiaries.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner, Florencio P. Sauceda, through the undersigned counsel, and, pursuant to Rule 12, files this petition for writ of certiorari to the Fifth Circuit Court of Appeals at New Orleans, Louisiana, and, in support thereof, would show the Court as follows:

OPINIONS BELOW

The opinion of the court of appeals is reported at *Sauceda v. City of Del Rio*, 2003 U.S. App. LEXIS 16609 (U.S. App., 2003). The opinion of the district court is unreported. The opinions of the district court and the court of appeals are both appended to this petition.

JURISDICTION

The Fifth Circuit affirmed the lower court's opinion on August 12, 2003. The jurisdiction of this Court is invoked under 28 USC § 1254 (1). This petition is timely if filed on or before November 10, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 42, Section 1983, of the United States Code reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any

Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Texas Government Code § 551.102 reads:

A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.

STATEMENT

The jurisdiction of the district court was invoked under the Fourteenth Amendment to the United States Constitution, 42 USC §§ 1981, 1983, and 1988, or 28 USC §§ 1441(b) and 1331. The district court had pendent jurisdiction to hear plaintiff's claims of breach of contract, defamation, and Texas Open Meetings Act ("TOMA") violations because these claims arose out of the same facts.

On or about August 31, 1999, Florencio P. Sauceda ("Sauceda") and the City of Del Rio, Texas ("Del Rio") entered into a written contract under which Sauceda was to be hired as the Del Rio City Manager. The stated term of employment was from August 31, 1999 through September 2002. The contract further provided that:

In the event Employee is terminated by the Council and during such time that Employee is willing and able to perform his duties under this agreement, then in that event, Employer agrees to pay to the Employee a lump sum cash payment equal to the balance of the initial or any extended contract term or an amount equal to twelve (12) months aggregate salary,

whichever is greater. Provided, however, and notwithstanding any of the terms and provisions contained herein, the Employer shall have no obligation to any severance sum designated in this paragraph in the event that the Employee is terminated for any of the following:

(a). Conviction of illegal acts involving personal gain; or

(b). Good cause supported by clear and convincing evidence as determined by a neutral, independent hearing officer. The Employee or Employer may request a hearing on the existence of good cause.

Pursuant to the contract, Sauceda was to receive a base salary of $84,000.00 per year and benefits that brought his total annual salary up to $109,080.08.

In May 2000, a new majority took control of the City Council headed by Mayor Dora Alcala. The new majority and Mayor Alcala called a meeting on June 13, 2000, to discuss, among other things, the City Manager. At that time, Sauceda was not made aware of any deficiencies with his performance as City Manager. However, prior to the elections, it was a common rumor in Del Rio that Sauceda would lose his job if the majority incumbents on the City Council lost their positions. Councilman Randy Pohler had been very outspoken against Sauceda since February 1999, when Sauceda was serving as the acting City Manager. Pohler formulated, in writing, a list of good cause reasons for terminating Sauceda and presented it to City Attorney Sepeda in June 2000.

On June 26, 2000, without any written or oral notice to Sauceda, the Council and Mayor Alcala conducted an evaluation of Sauceda's performance as City Manager. Sauceda received mixed evaluations. While Mayor Alcala, Otilia Gonzalez, and Randy Pohler gave an "unacceptable" rating, Rodolfo Chapa rated Sauceda's performance as "meets expectations," Rino Luna rated Sauceda's performance as "outstanding," and Efrain Valdez rated Sauceda's performance as "exceeds expectations." Overall, Sauceda's evaluation was at, or slightly above, average.

At the June 27, 2000 City Council meeting, the Council was presented with the findings of an investigation into allegations of sexual harassment made against Sauceda by city employees. The Council voted in open session, four votes to three, to instruct the City Attorney to prepare a resolution for the next regular Council meeting, dismissing Sauceda as City Manager. Before and during this meeting, Sauceda was never allowed to respond, either verbally or in writing, to the purported good cause reasons for his removal.

On July 11, 2000, the Council met, and in a six-hour closed meeting, terminated Sauceda's employment as City Manager. This meeting was the first time that Sauceda was notified in writing and presented with written charges alleging misconduct and the reasons for his termination. City Attorney Sepeda testified about the short notice to Sauceda and the lack of due process:

> Q: Did Mr. Garza or any of the other two minority board members – council members take the position that his – the actual vote on termination should be postponed until Mr. Sauceda had an opportunity, and his lawyer, to review the written charges and to respond to them?

A: I don't remember that specific kind of comment. I think Mr. Garza made a statement or two with Mr. Sauceda present during the personnel executive session that this was his due process and – and kind of laughing or – or ironically laughing, concerned about the – how quickly it was going. I don't remember what his exact statements were. He showed some concern about that.

Councilman Robert Garza had previously served as Del Rio's City Attorney and has an active practice of law in Del Rio. He was very upset about what he perceived to be the improper and illegal firing of Sauceda.

During executive session, Mayor Dora Alcala instructed the City Attorney to draft a letter dismissing Sauceda. Before voting on Sauceda's termination in open session, Mayor Alcala handed Sauceda the letter of termination, dated July 11, 2000, which stated: "for all of these reasons, the City Council finds there is good cause for your removal." At the meeting, Sauceda's attorney requested a good cause hearing pursuant to the employment contract. Nevertheless, the Council terminated Sauceda that night without an independent good cause determination.

After the executive session, the Council reconvened in open session and voted four to three to terminate Sauceda's employment as City Manager. An independent good cause determination was not provided to Sauceda as mandated by the severance pay clause of the contract. Instead, the City Council passed a Resolution that night, which stated:

"Florencio P. Sauceda should be removed from office for good cause for the following reasons.... This

resolution shall become effective immediately upon its passage."

One City Council member, who did not share the majority's hostility toward Sauceda, voted to terminate him simply because he was fearful of Sauceda's numerous supporters that appeared at the meeting that night. Councilman Rodolfo Chapa testified that the "rebel rousers" attending the meeting in support of Sauceda would be disruptive to the Council.

Q: Since you gave him an average evaluation a few months before this vote was taken, can you tell me why you voted to terminate him?

(Objection by Defense Counsel)

A: The reason, I felt that – that I didn't want the City to – to be in an uproar. I felt that we were going to go – the City Council would be bickering back and forth and – and we were just getting to where we started this treatment plant going and we had a lot of things that had to be done and I figured we're never going to get this thing finished up.

On July 24, 2000, City Attorney Sepeda wrote a letter to Sauceda's attorney making an offer of a good cause hearing and inviting Sauceda's attorney to discuss the selection of the hearing officer and other matters related to the hearing. On October 10, 2000, Sauceda's counsel responded in writing, stating that the Council had breached Sauceda's employment contract and that he was entitled to severance pay as a matter of contractual right. The letter by Sauceda's counsel concluded, that in the absence of full reinstatement to his

former position, Sauceda would seek redress in a court of law.

In his Complaint, Sauceda brought causes of action against Del Rio for due process violations, breach of contract, defamation, and TOMA violations. Sauceda thereafter amended his pleadings to add a cause of action for the violation of his First Amendment rights under the United States Constitution regarding freedom of association.

On August 20, 2002, the United States Magistrate Judge filed a Report and Recommendation regarding motions for summary judgment submitted by both parties. The Magistrate Judge recommended that plaintiff's breach of contract and due process claims be sustained, while recommending that the other causes of action be dismissed.

The district court overruled Sauceda's objections to the Magistrate Judge's Report and Recommendation regarding the contract and TOMA issues and granted defendant's motion for summary judgment on all causes of action. Specifically, the district court found that the July 11 letter did not raise a fact issue that the Council did any more than deliberate Sauceda's dismissal, that the severance pay provision of the contract was not ambiguous, and that Sauceda waived his right to a good cause determination.

The court of appeals affirmed, stating, "In particular, we affirm the district court's conclusion that Sauceda waived any right to a good cause determination by rejecting the City's offer to hold a hearing on good cause."

REASONS FOR GRANTING THE PETITION

I. The Issue Presented is of Practical Importance to all Governmental Entities and Employees

No cases are reported concerning whether due process rights should be accorded an at-will employee who is unilaterally provided with a good cause determination hearing. However, it is certain that this is not the only instance where this set of circumstances has occurred. A decision by the Court on this issue will prove to be of great practical importance where a governmental body provides a modicum of due process to at-will public employees, or others in similar circumstances, but who are nevertheless not accorded full due process protections.

A. Sauceda's due process interests were implicated when Del Rio unilaterally conducted a good cause hearing.

Despite the fact that he served as an at-will employee, the City convened a "good cause" determination hearing to support Sauceda's termination, but Sauceda was not accorded the traditional due process rights that are attached to such a hearing. Sauceda was not provided with a copy of the written charges against him until his termination hearing was under way, he was not allowed to confront his accusers, and he was not allowed to present and cross-examine witnesses in his defense. Few rights are more fundamental than that of an accused to present witnesses in his own defense.[1]

[1] *Chambers v. Mississippi*, 410 U.S. 284, 302; 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

In *Goldsmith v. Board of Tax Appeals*, this Court considered the case of a lawyer who had been refused admission to practice before the Board of Tax Appeals.[2] The Board published rules for admission, which provided that the Board may, in its discretion, deny admission to any applicant, or suspend or disbar any person after admission.[3] The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. But the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. The Court stated that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such notice, hearing and opportunity to answer for the applicant as would constitute due process."[4]

Rather than possessing a unilateral expectation of due process protection, the City's action in making a good cause determination where none was required conferred on Sauceda a legitimate claim of entitlement to it. Where such an important right is conferred, its concomitant protections cannot be capriciously denied. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. The right to a hearing exists to allow an opportunity for a person to vindicate claims made against him.[5]

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[2] *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117; 46 S. Ct. 215; 70 L. Ed. 494 (1926).

[3] *Id.* at 119.

[4] *Id.* at 123.

[5] *Board of Regents v. Roth*, 408 U.S. 564, 577; 92 S. Ct. 2701, 2709; 33 L. Ed. 2d 548 (1972).

When the City of Del Rio chose to provide a hearing to Sauceda, it was required to provide the basic tenets of constitutional due process. It is the policy of our system that governmental entities must conduct their affairs in conformity with notions of fair and equal treatment for all citizens. That treatment includes an expectancy of legal due process, and not a contravention of such basic principles.

II. The Decision Below is Incorrect

A change in political winds at the Del Rio City Council presaged Sauceda's termination as City Manager. The Council, in an effort to deny Sauceda his contractual right to severance benefits and deny him the right to an independent good cause hearing, illegally found good cause to terminate his employment. Del Rio's contractual duty exists regardless of Sauceda's participation in the good cause determination.

The Council's abrogation of its contractual duty and its denial of due process, in the face of Sauceda's demand for an independent hearing, were a repudiation of the employment contract. As such, Sauceda was within his legal rights to treat that repudiation as a breach of contract, and seek relief in a court of law. Sauceda's actions in informing the Council that it had breached the contract, and filing suit, prove that Sauceda had no intention of relinquishing his rights under the contract. Sauceda did not waive his right to an independent good cause hearing. To date, Del Rio has not presented evidence to support Sauceda's termination before a neutral, independent hearing officer, and no independent good cause determination has been made.

In violation of the Texas Open Meetings Act, the Council made a final determination in a closed session meeting that Sauceda would be terminated. In handing Sauceda a signed

termination letter during the closed meeting, the final act of Sauceda's termination was completed. The Council's attempt to ratify the illegal action by vote taken in open session was ineffectual. The Council's illegal attempt to terminate Sauceda is void as a matter of law.

A. A governmental body violates the Due Process Clause of the Fifth and Fourteenth Amendments when it makes a good cause determination to terminate a public employee, where the employee has a contractual right for the good cause determination to be made by a neutral, independent hearing officer.

Despite Sauceda's contractual right to an *independent* good cause determination, the City unilaterally terminated Sauceda for good cause. Sauceda was an at-will employee and the City did not need to establish good cause to terminate him. However, an independent good cause determination was a condition precedent to the withholding of severance benefits. The City admittedly engaged in a naked attempt to avoid paying severance benefits to Sauceda. The contract provides that the severance obligation was incurred once Sauceda was terminated. Only when a neutral, unbiased hearing officer makes the good cause determination does the severance obligation fall away. The Council's actions were taken to eliminate the need to pay severance benefits. City Attorney Sepeda explained the reason for the impromptu good cause determination:

> A: No. I felt it was in the best interest of the City to try and terminate Mr. Sauceda under good cause because that would be less costly to the City and—

Q: So you thought that if you terminated him for other than good cause, that the City would have to pay him according to the contract; isn't that right?

A: That's right. It was very clear. That—That's the way we approached it and the Council knew about that.

Rather than abide by the contract and provide Sauceda with an independent good cause determination, the Council elected to engage in a deceptive charade with the explicit intent of abrogating its contractual obligation. In a marathon six-hour executive session on July 11, 2000, the Council not only terminated Sauceda in an arbitrary and capricious manner, but it also purported to find good cause for his termination. This determination of good cause was not supported by clear and convincing evidence, and was not made by a neutral, independent hearing officer. As such, Sauceda is owed the severance benefits as a matter of contractual right.

i. Del Rio's repudiation of the employment contract entitled Sauceda to pursue a legal remedy in a court of law. Sauceda has not waived his right to a good cause hearing.

A genuine issue exists as to the timing of an independent hearing, and as to whether Sauceda's participation in the hearing was mandatory given that a good cause determination had already been made. That these issues are genuine is evidenced by the Magistrate Judge's determination that section 3A(b) of the contract, which provides for the good cause hearing, is ambiguous. The Magistrate Judge found that since the provision is "subject to more than one reasonable interpretation, the interpretation of section 3A(b)

must be left to a fact-finder." In both application and theory, the severance provision is ambiguous and uncertain. That is also why the Magistrate Judge found that the issue of the timing of the good cause hearing should be presented to a fact-finder.

When the City made the offer to discuss an independent hearing on July 24, 2000, Sauceda had already been terminated for good cause without the benefit of clear and convincing evidence as determined by a neutral, independent hearing officer. The terms of the contract that would allow Sauceda to receive severance benefits had already been fulfilled, and he was entitled to those benefits as a matter of contractual right. Given the sequence of events and the City's independent finding of good cause, the contract provision regarding termination and the severance benefit can only be interpreted as follows:

> Section 3.Severance Pay
>
> A. *In the event Employee is terminated by the Council and during such time that Employee is willing and able to perform his duties under this agreement, then in that event, Employer agrees to pay to the Employee a lump sum cash payment equal to the balance of the....*
>
> Interpretation: the obligation of paying the severance benefit attaches upon the Employee's termination where he is willing and able to yet perform.
>
> *Provided, however, and notwithstanding any of the terms and provisions contained herein, the Employer shall have no obligation to pay any severance sum*

designated in this paragraph in the event that the Employee is terminated for any of the following:

Interpretation: the Employer's obligation to pay the severance benefit ceases in the event that the Employee is terminated pursuant to one of the two following scenarios:

(a) Inapplicable*; or*

(b) Good cause supported by clear and convincing evidence as determined by a neutral, independent hearing officer. The Employee or Employer may request a hearing on the existence of good cause.

Interpretation: In the event Employee is (1) terminated; (2) for good cause; (3) supported by clear and convincing evidence; and (4) as determined by a neutral, independent hearing officer, the City has no severance obligation. Conversely, in the event all four conditions as listed above are not met, the Employer must pay the severance obligation to the Employee. Either the Employer or the Employee *may* request a good cause hearing, but neither is required to do so.

These contractual prerequisites that would allow the City to forego its severance obligation did not occur. Sauceda was not terminated as an at-will employee, although he served in that capacity. He was terminated for good cause where none was required, and then offered an independent good cause hearing as an afterthought—admittedly to avoid the City's severance obligation. Sauceda could not waive his right to an independent hearing on October 11, 2000 because the City had already repudiated the contract by establishing good cause

on its own. He could only have waived his right to a good cause hearing by declaring his intent to do so before the good cause determination had been made. These issues are material facts since they are dispositive of the outcome of Sauceda's contract claim.

The Council's conduct constituted a repudiation of the employment contract. Repudiation is conduct which shows a fixed intention to abandon, renounce, and refuse to perform the contract.[6] Repudiation consists in such words or actions by a contracting party as indicate that he is not going to perform his contract in the future.[7] Under Texas law, an anticipatory repudiation gives the nonrepudiating party the option to treat the repudiation as a breach, or ignore it and await the agreed-upon time of performance.[8] The Council's material breach and repudiation of the contract in finding good cause *sua sponte* provided Sauceda with no other remedy than to file suit and seek damages.

The Council went to great lengths to terminate Sauceda for good cause. As noted, this was done to abrogate the severance clause provision. However, the Council's good cause determination obviously did not comport with the contract. The Council was aware that its good cause determination violated the severance pay provision, because Sauceda's counsel specifically asked for an independent determination on July 11, 2000.

Sauceda notified the City of Del Rio and the City Attorney that the contract was breached and that he would not

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[6] *Continental Casualty Co. v. Boerger*, 389 S.W.2d 566, 568 (Tex. Civ. App.--Waco 1965, *writ dism'd*).

[7] *Id.*

[8] *Bumb v. Intercomp Technologies*, 2001 Tex. App. LEXIS 6454, * 2-3.

participate in any additional good cause proceedings. Moreover, Sauceda informed the City Attorney that he was treating the repudiation as a breach of contract, and would be seeking redress with the courts. Clearly, Sauceda did not waive his rights under the contract.

The law on waiver is well established. "A party's express renunciation of a known right can establish waiver. Silence or inaction, for so long a period as to show an intention to yield the known right, is also enough to prove waiver."[9] Waiver is largely a matter of intent; thus, for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.[10] Although waiver is ordinarily a question of fact, when the facts and circumstances are admitted or clearly established, the question becomes one of law.[11] Here, the facts are undisputed: Del Rio's waiver argument rests squarely on the substance of Sauceda's letter in response to the City Attorney's untimely offer of a good cause hearing.

After Del Rio's repudiation of the contract, Sauceda was free to pursue his remedy in a court of law, and had no obligation to participate in an untimely hearing. There is nothing in the record to indicate that Sauceda intended to relinquish his right to the contractual good cause determination, and he did not waive his right to such a hearing.

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[9] *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996).

[10] *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996) (applying to waiver of arbitration rights).

[11] *Tenneco, supra*, at 643.

ii. The Del Rio City Council's act of presenting to Sauceda, in executive session, a signed letter of termination constituted a final resolution regarding Sauceda's employment, in violation of the Texas Open Meetings Act.

The TOMA requires that a final action, decision, or vote on a matter deliberated in a closed meeting may only be made in an open meeting.[12] The City was free to deliberate Sauceda's employment status in closed session.[13] "Deliberate" is defined as a verbal exchange during a meeting between a quorum of a governmental body, or between a governmental body and another person.[14]

A final action, decision, or vote on a matter deliberated in a closed meeting under the Texas Open Meetings Act may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.[15] Contrary to this statute, the Council took the final action of presenting Sauceda with a letter of termination in a closed meeting, thus terminating his employment as City Manager, in violation of the TOMA. The letter was prepared by City Attorney Sepeda on instruction from Mayor Alcala during a six-hour closed session. Sauceda never received another written notification of his termination for good cause.

The letter, written on City of Del Rio letterhead and signed by the Mayor, details eight failings or deficiencies of Sauceda's performance as City Manager. It concludes with the following: "For all of these reasons, the City Council finds there is good cause for your removal." Given the

[12] TEX. GOV'T CODE § 551.102.
[13] TEX. GOV'T CODE § 551.074.
[14] TEX. GOV'T CODE § 551.001.
[15] *See* TEX. GOV'T CODE § 551.102.

context of the lengthy closed session, the discussion of Sauceda's failings as City Manager, and the common perception in the community that Sauceda would be fired once the new majority took office, it is quite evident that the written notice of Sauceda's termination evidences a deliberation and vote by Council members in executive session contrary to law.

The City offered no evidence, other than the Council's subsequent vote in open session, to rebut Sauceda's assertion that the action taken in closed session – his termination – was final. The letter of termination handed to Sauceda was the only written notice he received regarding his employment status. He received no written notice that he was terminated after the Council went into open session and voted on the termination. The undisputed evidence strongly suggests that Sauceda's termination was effectuated and concluded in executive session.

This case can be readily distinguished from *Thompson v. City of Austin*, in which the court found no violation of § 551.102.[16] Under the Act, there is a distinction between meetings at which only deliberation takes place and meetings at which decisions are made.[17] In *Thompson*, the appellants asserted that the city council made its final decision regarding their employment in closed session.[18] The court found that the appellants presented no evidence of anything other than a deliberation behind closed doors.[19] In contrast, Sauceda has

[16] *Thompson v. City of Austin*, 979 S.W.2d 676 (Tex. App.—Austin, 1998, no pet.).

[17] *Thompson, supra* at 685; *Board of Trustees v. Cox Enter., Inc.*, 679 S.W.2d 86, 89 (Tex. App. —Texarkana 1984), rev'd in part on other grounds.

[18] *Thompson, supra,* at 685.

[19] *Id.*

produced competent evidence to overcome summary judgment. Sauceda's competent summary judgment evidence creates a *prima facie* case that the Council's actions rise above mere deliberation and discussion, and raises a question of fact regarding whether the action was final and in violation of the statute.

In *Board of Trustees v. Cox Enterprises*, a school district board of trustees took a written vote on which of two board members would serve as president, and the winner of the vote was announced.[20] The board then returned in open session and voted unanimously for the individual who won the vote in the executive session.[21] Although the board argued that the written vote in the executive session was "simply a straw vote" that did not violate the Act, the court of appeals found that "there is sufficient evidence to support the trial court's conclusion that the actual resolution of the issue was made in the executive session contrary to the provision of the statutory predecessor to Section 551.102.[22] *Cox Enterprises* makes clear that a governmental body should not take a "straw vote" or otherwise attempt to count votes in an executive session. An action taken by a governmental body in violation of the TOMA is voidable.[23] In *Ferris v. Texas Board of Chiropractic Examiners*, the court held that an employee of a governmental agency who is initially illegally terminated in violation of the TOMA, but who is later properly terminated in compliance with the Act, is entitled to injunctive relief

[20] *Board of Trustees v. Cox Enterprises*, 679 S.W.2d 86 (Tex. App. —Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986).

[21] *Id.* at 90.

[22] *Id.*

[23] TEX. GOV'T CODE § 551.141.

allowing reinstatement, back pay and benefits for the period of time between the illegal and legal terminations.[24]

A governing body's attempts to terminate an employee in violation of the Texas Open Meetings Act are void as a matter of law. Moreover, the Council's attempt to ratify the illegal action by vote taken in open session was ineffectual.[25] Consequently, the action taken to terminate Sauceda, and ratify that termination, is void.[26]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[24] *Ferris v. Texas Board of Chiropractic Examiners*, 808 S.W.2d 514, 516 (Tex.App.—Austin 1991, *writ denied*).
[25] *Ferris, supra*, at 518.
[26] *See Piazza v. City of Granger*, 909 S.W.2d 529 (Tex.App.—Austin 1995, *no writ*).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-51336

[Filed August 12, 2003]

FLORENCIO P. SAUCEDA,
Plaintiff-Appellant,

versus

CITY OF DEL RIO, by and through its City Council; DORA ALCALA, Mayor, in their individual capacities; RANDY POHLER, in their individual capacities,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas
No. DR-01-CV-4-OLG

JUDGES: Before EMILIO M. GARZA and DENNIS, Circuit Judges, and VANCE*, District Judge.

* District Judge of the Eastern District of Louisiana, sitting by designation.

OPINION

PER CURIAM:**

Florencio P. Sauceda appeals the district court's summary judgment dismissal of his claims against the City of Del Rio, Texas ("the City") and various individual defendants. This dispute arises out of the City's termination of Sauceda's employment as city manager. On appeal, Sauceda contends that he is entitled to severance benefits because the City failed to comply with the good cause provision of his employment contract. Sauceda argues that his rejection of the City's offer of a good cause hearing did not waive his rights under that provision. Sauceda also contends that the City Council's actions in terminating his employment violated the Texas Open Meetings Act, TEX. GOV'T CODE § 551.001 et seq.

We have read the briefs, heard the arguments of counsel, and consulted the pertinent portions of the record. On the basis of the applicable law and the record, we affirm the dismissal of Sauceda's claims for essentially the same reasons as those given by the district court. In particular, we affirm the district court's conclusion that Sauceda waived any right to a good cause determination by rejecting the City's offer to hold a hearing on good cause.

AFFIRMED.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CAUSE NO. DR-01-CA-04-OG

[Filed October 31, 2002]

FLORENCIO P. SAUCEDA, Plaintiff,	)
v.	)
CITY OF DEL RIO, by and through its City Council, MAYOR DORA ALCALA, and RANDY POHLER, in their individual and official capacities, Defendants.	)

ORDER

Plaintiff Sauceda has filed a motion to alter or amend judgment pursuant to FED. R. CIV. P. 59(e). Plaintiff states that the purpose of the motion is "to correct manifest errors of law." Reconsideration of a judgment after its entry, however, is an extraordinary remedy that should be used sparingly, 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL

§ 2810.1, at 124 (2d ed.1995). A Rule 59(e) motion cannot be used to raise arguments that could and should have been presented before the judgment was rendered, or to argue the case under a new legal theory. See Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990).

Plaintiff reurges arguments previously reviewed and rejected by the Court. He has failed to show any manifest errors of law. The motion is DENIED.

SIGNED this 28 day of October, 2002.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CAUSE NO. DR-01-CA-04-OG

[Filed September 16, 2002]

FLORENCIO P. SAUCEDA, Plaintiff,	)
v.	)
CITY OF DEL RIO, by and through its City Council, MAYOR DORA ALCALA, and RANDY POHLER, in their individual and official capacities, Defendants.	)

ORDER ACCEPTING IN PART AND REJECTING IN PART THE RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the Court are the report and recommendation of United States Magistrate Judge Dennis G. Green (docket no. 54), and the objections of defendants and plaintiff.

Sauceda objects to the magistrate judge's recommendation that the council did not violate the Texas Open Meetings Act

(TOMA). He argues that the two letters dated July 11, 2000 create a fact issue that the council's decision to terminate him was made in closed session and subsequently ratified by a public vote in open session. Sauceda cites Esperanza Peace and Justice Center v. City of San Antonio, SA-98-CA-0696-OG, 2001 WL 685795, *31 (W.D. Tex. May 15, 2001), a decision by this Court. Esperanza is distinguishable. In Esperanza, there was extensive evidence that a majority of council members met with the mayor and with each other on the night before the council was to vote on the city budget at a public meeting. The closed deliberations led to unanimous agreement on a series of budget changes, and all council members signed a final draft of the consensus memorandum prepared by the mayor before the next day's open meeting. *Id.* at *30-31. In Esperanza it was clear that a majority of the council had deliberated and decided on the budget in private, and merely ratified this decision in the next day's open meeting. Further, there is no provision of the TOMA that permits a city council to deliberate budget matters in closed meetings. In contrast, section 551.074 of the TOMA permits a council to deliberate the dismissal of a public employee in a closed meeting. TEX. GOV'T CODE § 551.074. The July 11 letters do not raise a fact issue that the council did any more than deliberate Sauceda's dismissal, which they subsequently decided by a vote in the open meeting after hearing from Sauceda's attorney, Sauceda's objections are overruled.

Defendants object to the recommendation of the magistrate judge concerning the severance pay clause of Sauceda's employment contract. The magistrate judge concluded that the clause is ambiguous regarding the timing of a severance pay hearing, that is, whether the hearing is to be held before or after the council voted to terminate plaintiff's employment.

Whether a contract is ambiguous is a question of law. Reilly v. Rangers Management, Inc., 727 S.W.2d 527, 529 (Tex. 1987).

The Court does not agree that the provision is ambiguous. The contract states that the employer shall have no obligation to pay severance pay if the employee is terminated for "[g]ood cause supported by clear and convincing evidence as determined by a neutral, independent hearing officer. The Employee or Employer may request a hearing on the existence of good cause." Thus, the timing of the hearing is contingent on a request made by the employer or employee. Presumably, the request may be made either before termination (although few would request a hearing on the obligation to pay severance pay prior to actual termination) or at a reasonable time following termination. In the present case, the council terminated Sauceda at its July 11, 2000 meeting. At that meeting, Sauceda's attorney requested a good-cause hearing. On July 24, 2000, the city attorney wrote a letter to Sauceda's then-attorney offering a hearing and requesting Sauceda's input concerning the identity of the hearing officer as well as the date and location of the hearing. Sauceda's present attorney responded with an October 10, 2000 letter stating that it was too late to participate in a good-cause hearing because Sauceda had already been terminated. Sauceda's position throughout this litigation is that the contract requires a good-cause hearing prior to termination, but as the magistrate judge has shown, that provision of the contract clearly relates only to the city's liability to pay severance pay. Sauceda's mistaken interpretation of the unambiguous severance-pay hearing provision does not raise a fact question concerning timing. Further, once Sauceda declined to participate in the good-cause hearing, he waived

his right to a good-cause determination. Thus, the Court need not address defendant's argument that the severance pay provision is void because it violates the Texas Constitution.

The Court has conducted an independent review of the record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The Court concludes that plaintiff's objections lack merit, and they are overruled. Defendant's objections are affirmed. The report and recommendation is accepted in part and rejected in part, It is ORDERED that plaintiff's motion for partial summary judgment (docket no. 34) is DENIED, that defendants' motion for summary judgment (docket no. 44) is GRANTED, and that plaintiff's causes of action are DISMISSED. All pending motions, if any, are OVERRULED AS MOOT.

SIGNED this 13 day of September, 2002.

/s/ _____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

CAUSE NO. DR-01-CA-04-OG

[Filed August 20, 2002]

FLORENCIO P. SAUCEDA, Plaintiff,	)
v.	)
CITY OF DEL RIO, by and through its City Council, MAYOR DORA ALCALA, and RANDY POHLER, in their individual and official capacities, Defendants.	)

UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the court are motions for summary judgment filed by Defendants City of Del Rio, Dora Alcala and Randy Pohler (document 44), and Plaintiff Florencio Sauceda (document 34). This Report and Recommendation is submitted pursuant to 28 U.S.C. § 636(b)(1). After reviewing the record and the relevant law, the undersigned recommends that the plaintiff's motion for partial summary

judgment be denied, and that the defendants' motion for summary judgment be granted in part and denied in part.

Background and Procedural History

The record shows that in August of 1978, Plaintiff Florencio Sauceda was hired by the City of Del Rio to work in the finance department. He was eventually promoted to assistant city manager in 1989 and became acting city manager the following year. On July 25, 1994, however, the city council passed a resolution suspending Sauceda for 45 days. The resolution stated that the council had lost confidence in Sauceda and cited four reasons for the suspension, all of them involving poor job performance. Sauceda's initial termination hearing before the city council was scheduled for August 16, 1994; however, he sought and obtained a temporary restraining order from a state court preventing the city council from conducting that hearing. Following a state court hearing on Sauceda's unsuccessful request for a temporary injunction, the city council conducted a public hearing on September 13, 1994, and voted on that same day to terminate Sauceda's employment as the city manager.

In February 1999, Sauceda was rehired as the Del Rio City Manager on a interim basis. In the summer of that year, the city council conducted a search for a permanent city manager and solicited applications from prospective candidates, but rather than interview the prospective candidates, the city council decided to hire Sauceda as the permanent city manager. Sauceda prepared an employment contract for approval by the city council. He prepared the contract by using his former contract as city manager and

adding provisions from contracts with other Del Rio city managers. On August 2, 1999, the Del Rio City Council approved Sauceda's contract to serve as the city manager, at a salary of $84,000 per year plus other benefits.

In March and April of 2000, two female city employees complained of sexual harassment by Sauceda. One employee, Juanita Barrera, complained to the city attorney, Martha Sepeda, that Sauceda had touched her in an offensive manner. In April of 2000, Sepeda also received a notice from Frances Rodriguez, the Director of Finance, that one of her employees, Lucy Bishop, a payroll clerk in the finance department, had complained of sexual harassment by Sauceda. Sepeda consulted with outside legal counsel in the labor law field and informed the city council of the sexual harassment complaints and sought approval to retain an independent, outside investigator to investigate these claims. On April 27, 2000, Sepeda held a confidential attorney-client meeting with the Del Rio City Council to discuss the complaints against Sauceda. The council approved the retention of an outside investigator to conduct the investigation.

In June 2000, Katherine Martinez-Vitela conducted an investigation concerning the sexual harassment complaints. After interviewing approximately 20 witnesses, she prepared a 23 page report containing her findings, which was presented to the city council on June 27, 2000, by the city attorney and the outside legal counsel, John Ferguson, in closed session. At the June 27 city council session, according to the minutes of the meeting, the council voted, in open session, four votes to three, to instruct the city attorney to prepare a resolution

for the next regular council meeting dismissing Sauceda as city manager.

On July 11, 2000, the city council met to discuss the resolution for the removal of Sauceda as city manager. The council met in open and closed, executive session. Sauceda retained legal counsel who appeared with him during the executive session meeting, which was closed to the public. Both Sauceda and his attorney were presented with written evaluations prepared by various city council members and the mayor, Sauceda's attorney asked questions of each council member concerning their criticisms as well as compliments of Sauceda's job performance. During the executive session meeting, Sauceda also was served with a letter dated July 11, 2000, stating that the city council found there was good cause for his removal as city manager.[1] After delivery of the letter to Sauceda, the city council reconvened in open session. Sauceda's attorney spoke to the city council and the public prior to the vote. At the conclusion of the meeting the council

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[1] The letter listed seven reasons for the decision: (1) insubordination; (2) impeding and obstructing requests for information from City Council members about administering finances (3) failing to respond to requests for action, information and written responses from City Council members; (4) failing to keep the City Council advised of the financial conditions and future needs of the City; (5) failing to carry out programs adopted by the council; (6) excessive absence from the city; (6) failing to follow and effectively implement the City's adopted personnel policies and procedures guidelines and manual; (7) exposing the City to possible liability by Manager's statements and comments to non-employees about city employees.

voted, four votes to three, to terminate Sauceda's employment as city manager.

On January 17, 2001, Sauceda filed this lawsuit. His first amended complaint asserts claims for breach of contract, "First Amendment violations," defamation, and Texas Open Meetings Act violations.

Discussion

Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that, as a matter of law, the movant is entitled to judgment, *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* In a motion for summary judgment, the burden is on the movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by showing that there is an absence of evidence to support the non-movant's case. *Id. See also Little*, 37 F.3d at 1075. Once the movant meets its burden, the non-movant must show that summary judgement is not appropriate, *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not

satisfied with 'some metaphysical doubt as to material facts,' ...by 'conclusory allegations,' ...by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Anderson,* 477 U.S. at 248; *Munoz v. Orr,* 200 F.3d 291, 302 (5th Cir. 2000).

Breach of Contract

One of the principal issues in this case concerns the interpretation of the following provisions of Sauceda's employment contract with the City of Del Rio, which was signed by the parties on August 31, 1999. Section two of the agreement, entitled "Term," reads as follows:

A. Nothing in this agreement shall prevent, limit or otherwise interfere with the right of the Council to terminate the services of Employee at any time.

B. Nothing in this agreement shall prevent, limit or otherwise interfere with the right of the Employee to resign at any time from his position with Employer.

C. This agreement shall commence immediately upon its approval by the parties and shall continue in

full force and effect until September 30, 2002.

D. This contract shall be automatically extended for an additional period of one (1) year in the event that written notice is not given by either party to the other party on or before April 1st of each calendar year. In the event of such an extension, this agreement shall be extended on the same terms and conditions specified herein. In the event of such notice denying the one (1) year extension, the remaining period of this contract shall continue in full force and effect.

Section three of Sauceda's employment contract, entitled "Severance Pay," reads as follows:

> In the event Employee is terminated by the City Council and during such time that Employee is willing and able to perform his duties under this agreement, then in that event, Employer agrees to pay to the Employee a lump sum cash payment equal to the balance of the initial or any extended contract term or an amount equal to twelve (12) months aggregate salary, whichever is greater. Provided, however, and notwithstanding any of the terms and provisions contained herein, the Employer shall have no obligation to pay any severance sum designated in this paragraph in the event that the Employee is terminated for any of the following:
>
> (a) Conviction of illegal acts involving personal gain; or
> (b) Good cause supported by clear and convincing

> evidence as determined by a neutral, independent hearing officer. The Employee or Employer may request a hearing on the existence of good cause.

Sauceda moves for partial summary judgment on his breach of contract claim, reasoning that (1) since it is undisputed that he was not terminated by the city council for any acts arising under section 3A(a), and (2) since it is also undisputed that he never received severance pay as required by section 3A, that the City of Del Rio was obligated to pay his salary under the contract unless it had good cause to terminate his employment, supported by clear and convincing evidence as determined - according to section 3A(b) - by an independent hearing officer. Sauceda also claims that the defendants' breach of the contract caused him to suffer monetary damages in the amount of $327,240.00 - a sum which, according to the plaintiff's summary judgment motion, takes into account his yearly base salary of $84,000, a yearly car allowance of $6,000, the three years remaining on his contract, plus other benefits.[2]

Neither party disputes that Texas law governs the construction and enforcement of Sauceda's employment

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[2] The other benefits include annual life insurance premiums paid by the City in the amount of $2,400, annual stability payment made by the City in the amount of $1,680, three weeks of vacation per year in the amount of $4,846.20, annual annuity of $4,200, annual City health and dental benefits in the amount of $2,400, and annual holiday pay of $3,553.88. Sauceda claims that his total annual salary, including these benefits, was $109,080.08; and that his claim for damages takes into account the three years remaining on his contract at that rate of salary.

agreement. Under Texas law, the main elements in a suit for breach of contract are: (1) that a valid contract exists; (2) that the plaintiffperformed or tendered performance; (3) that the defendant breached the contract; and (4) that the plaintiff was damaged as a result of the breach. *See Barnett v. Mentor H./S. Inc.*, 133 F.Supp.2d 507, 510 (N.D. Tex. 2001); *Hussong v. Schwan's Sales Enterprises, Inc.*, 896 S.W.2d 320, 326 (Tex. App.- Houston [1st Dist.] 1995, no writ). To determine whether summary judgment based upon a contract is appropriate, the court must first decide whether the language of the contract is ambiguous. *See Hussong,* 896 S.W.2d 320 at 324. While an ambiguous contractual term may create a factual issue for the jury to resolve, the determination of whether an ambiguity exists in the contract is a question of law for the court. *American General Ins. Co. v. Ryan,* 274 F.3d 319, 328 (5th Cir. 2001). The rules of interpretation have been summarized by the Texas Supreme Court as follows:

> When a court concludes that contract language can be given a certain or definite meaning, then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law. A term is not ambiguous because of a simple lack of clarity. Nor does an ambiguity arise merely because parties to an agreement proffer different interpretations of a term. An ambiguity arises only after the application of established rules of construction leaves an agreement susceptible to more than one meaning. Further, for an ambiguity to exist, both potential meanings must be reasonable.

DeWitt County Elec. Co-op., Inc. v. Parks, 1 S.W.3d 96, 100

(Tex. 1999) (citations omitted); *see also International Turbine Services, Inc. v. VASP Brazilian Airlines,* 278 F.3d 494, 497 (5th Cir. 2002); *Childers v. Pumping Systems, Inc.,* 968 F.2d 565,569 (5th Cir. 1992). Moreover, provisions in a contract which are apparently conflicting must be reconciled and harmonized, if possible, by reasonable interpretation so that the entire agreement can be given effect. *See Evan's World Travel, Inc. v. Adams,* 978 S.W.2d 225, 230 (Tex. App. - Texarkana 1998, no pet.); *Exxon Corp. v. Eastman Kodak Co.,* 589 S.W.2d 473, 478 (Tex. Civ, App.- Texarkana 1979), *rev 'd on other grounds,* 603 S.W.2d 208 (Tex. 1980).

Bearing these principles in mind, the court finds that, to the extent Sauceda is suggesting that his employment could have been terminated only after a finding of good cause at a hearing before "a neutral, independent hearing officer"-to quote section 3A(b) of the agreement- his argument is flawed in two respects. First, construing Sauceda's contract in such a manner would require the court to overlook two important provisions -- sections 18 and 19 - of the Del Rio City Charter. Section 18, entitled "Appointment of city manager," mandates an indefinite term of office for the city manager. The provision, which effectively gives the city council at-will employment authority over the city manager, reads as follows:

> The council shall appoint for an indefinite term an individual who shall have the title of city manager and who shall have the powers and perform the duties in the charter provided. No mayor or councilman shall receive such appointment during the term for which he shall have been elected, nor within one (1) year after the expiration of the term of office to which he was

elected.

Section 19 of the City Charter, entitled "Removal of city manager," provides that the Del Rio City Council has the sole and final authority to remove the city manager. It reads as follows:

> The council may by affirmative vote of a majority of the full city council adopt a resolution removing the manager from office. The action of the council in removing the manager shall be final, it being the intention of this charter to vest all authority and fix all responsibility for such removal in the city council.

Where removal of a public official is expressly provided for in the city charter, it becomes part of the employment contract and officers of the city can be removed from their employment without a hearing. *See Barnett v. City of Plainview,* 848 S.W.2d 334, 338 (Tex. App.- Amarillo 1993, no writ (citing additional authorities).[3]

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[3] The defendants also argue that interpreting Sauceda's employment contract as requiring a pre-termination "good cause" hearing before an independent hearing examiner would place it direct conflict with sections 18 and 19 of the Del Rio City Charter, thereby rendering the agreement void and unenforceable because a city charter represents the fundamental law of the municipality in the same way that a constitution is the fundamental law of the state. *See Anderson v. City of San Antonio,* 123 Tex. 163, 67 S.W.2d 1036, 1037 (1934); *Central Pawer and Light Co. v. City of San Juan,* 962 S.W.2d 606, 612 (Tax. App. - Corpus Christi 1998, writ dism'd w.o.j.). It is worth noting, however, that even if one assumes that Sauceda's contract and the Del Rio City Charter are in hopeless conflict with one another and cannot be reconciled, the court is

Second, even a casual reading of the severance provision from which the plaintiff deduces an entitlement to a pre-termination finding of good cause- section 3A- shows that the hearing can be invoked only as to Sauceda's entitlement to severance pay, rather than as a prerequisite to his termination. Section 3A states that severance benefits will not be paid when the city manager is removed for good cause. Thus, the negative implication that the City may remove the city manager without cause is obvious and unambiguous. The contract itself fails to require cause for the termination of the city manager anywhere in the agreement, and section 2A of the contract clearly gives the city council authority "to terminate the services of Employee at any time." That the provision from which the plaintiff deduces the requirement for a pre-termination finding of good cause is entitled "Severance pay," which normally follows the termination of employment,

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aware of no case which stands for the proposition that an employment contract negotiated and entered in good faith between panics should be rendered void *ab initio* - to use file defendants' phrase-because it conflicts with provisions of a city charter. Indeed, at least one Texas court has held that a municipality may waive its charter provisions. *See City of Forth Worth v. Gene Hill Equipment Co., Inc.*, 761 S.W.2d 816, 819 (Tex. App. - Fort Worth 1988, no writ) (noting that in approving contract between City and Plaintiff, the city council waived City's right to enforce contrary provision of city charter). Even so, however, the court's interpretation of the contract as unambiguously providing that the city manager could be terminated with or without cause, and that he was not entitled to a pre-termination finding of good cause, thereby establishing an at-will employment relationship between Sauceda and the City, harmonizes the contract and the charter provisions, making it unnecessary to address that defendants' argument.

is further evidence that the City was authorized to terminate the city manager with or without cause.

The provision in the agreement setting a fixed term of employment, section 2C, does not alter this analysis. Although section 2C states a specific term of employment ending September 30, 2002, the agreement also gives either party - as provided in sections 2A and B -the ability to terminate the agreement "at any time." An employment contract establishes an at-will employment relationship "[w]hen a term of service is left to the discretion of either party, or the term is left indefinite, or terminable by either party..." *East Line & Red River R.R. Co. v. Scott,* 72 Tex. 70, 75, 10 S.W. 99, 102 (1888); *see also Ireland v. Franklin,* 950 S.W.2d 155, 158 (Tex. App. - San Antonio 1997, no pet.). The contract, in other words, read as a whole, clearly provides that Sauceda could be terminated with or without cause. The court therefore agrees with the defendants that the contract unambiguously authorizes the city council to terminate the city manager "at any time," thereby creating an at-will employment relationship between Sauceda and the City, but that the agreement also allows for a good cause hearing to determine the City's obligation for severance pay.

The court's analysis does not end there, however, for the timing of that hearing is in dispute. The record reflects that during the city council meeting of July 11, 2000, Sauceda's former attorney, Maricela Cavazos, requested a good cause hearing. At the conclusion of the meeting, the city council voted to terminate Sauceda's employment for "good cause," but neither party argues - and there is nothing in the summary judgment record to suggest- that the proceedings on July 11 complied in any way with 3A(b)'s requirement of "[g]ood

cause supported by clear and convincing evidence as determined by a neutral, independent hearing officer." The record also reflects that on July 24, 2000, City Attorney Martha Sepeda wrote a letter to Cavazos which offered the plaintiff a hearing under section three of the contract. The letter invited Cavozos to discuss "the selection of the hearing officer" and "the hearing procedure, a calendar, and deadlines," matters which are not covered in section 3A of the agreement. On October 10, 2000, however, Sauceda's present counsel responded in a letter stating that "it is too late to participate in so-called 'good cause' hearing after Mr. Sauceda has already been terminated." "Furthermore," the letter continued, "with respect to Mr. Sauceda's severance pay, there is no need for a hearing since he is entitled to that compensation as a matter of contractual right."

Thus, the only question at this point concerns the timing of the severance hearing. That either party was entitled to such a hearing, upon their request, is clearly and unambiguously stated in section 3A(b) of the employment agreement. The question, in other words, is whether the plaintiff was entitled to that determination before or after the city council voted on July 11 to terminate his employment. The defendants argue that the City's offer of a good cause hearing on July 24 was reasonable, given the absence of a time requirement under the severance pay clause. The defendants further claim it was reasonable for the hearing to have been held within weeks if not days after Sauceda's termination, and that his rejection of the hearing on October 10 constitutes a waiver of any rights under section 3A of the agreement. Sauceda maintains that his employment could not be terminated without a pre-termination finding of good cause by an independent hearing officer, pursuant to section 3A(b)

of the agreement. While this argument does not specifically address the question of severance pay, insofar as section 3A(b) is concerned, the court nonetheless finds that the provision is reasonably susceptible to more than one interpretation. One could read the provision, for example, as requiring the determination of good cause to occur either before or after the city council voted to terminate the plaintiff's employment. The significance of the plaintiff's demand for a hearing during the July 11 city council meeting, the city's offer of a hearing in the July 24 letter, and the plaintiff's subsequent rejection of that offer, would depend at least in part on which interpretation of section 3A(b) one chooses to follow. Since the provision is subject to more than one reasonable interpretation, the interpretation of section 3A(b) must be left to a fact-finder.

The defendants further argue that the severance pay obligation created under section 3A is void because it seeks to guarantee compensation for services not yet performed, in contravention Article III, § 52 of the Texas Constitution, which prohibits municipalities from granting "public money or thing of value in aid of" to individual, association, or corporation. TEX. CONST. ART. III, § 52. Article III, section 52(a) provides in part: "Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever...." *Id.* The Texas Supreme Court has held "that section 52(a)'s prohibiting the Legislature from authorizing a political subdivision 'to grant public money' means that the Legislature cannot require *gratuitous* payments to individuals, associations, or

corporations." *Texas Muncipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Commission,* 74 S.W.3d 377, 383 (Tex. 2002) (emphasis in original). The only case cited by the defendants in support of their argument that section 52(a) voids the severance provision is *Grimes v. Bosque County,* 240 S.W.2d 511 (Tex. Civ. App. - Waco 1951, writ ref'd n.r.e.), which was a lawsuit brought by a county against the former sheriff of that county and his surety to recover excess mileage fees paid to the sheriff while in the discharge of his official duties. Yet there is nothing in *Grimes* or any other case examined by this court to suggest that section 52(a) should render a contractually based severance provision of the kind at issue here void and unenforceable, particularly when that provision was negotiated and entered in good faith between parties. Moreover, Sauceda points out, and the court agrees, that the severance funds were not included in the employment contract as a gratuity or a donation to the plaintiff; rather, they were intended to compensate him in the event he was terminated. Accordingly, the court concludes that the severance provision in Sauceda's employment agreement is not voided by section 52(a). Both the plaintiff's motion for partial summary judgment and the defendants' motion for summary should therefore be denied as to the plaintiffs breach of contract claim.

The only remaining question concerns the plaintiff's argument that he had a protected property interest in both his continued employment and severance benefits, and that the defendants' denial of a hearing violated the procedural due process clause of the Fourteenth Amendment. Since the court has already determined that the plaintiff was an at-will employee, and therefore enjoyed no Constitutionally protected

interest in continued employment, *see Conner v. Lavaca Hospital District,* 267 F.3d 426, 438 (5th Cir. 2001) (noting that at-will employees enjoy no protected property interest under Fourteenth Amendment), the only question is whether the severance pay clause of the contract, section 3A, created a separate property interest invoking procedural due process concerns. "The extent to which an individual interest is a property interest protected by the due process clause must be determined by an examination of the source of the interest. In cases such as this, where the interest is created by some state law or contract, the limitations of the interest are determined by examination of the state law or contract." *Martin v. Memorial Hospital at Gulfport,* 130 F.3d 1143, 1148 (5th Cir. 1997). As explained above, however, the ambiguity of the severance provision makes it impossible for the court to resolve this issue without the assistance of a fact-finder. Accordingly, the court finds that the plaintiff has raised a genuine question of material fact regarding whether he had a property interest in severance benefits because of section 3A(b) of the employment contract.

The Texas Open Meetings Act

The defendants also move for summary judgment on the plaintiff's claim that the defendants violated the Texas Open Meeting Act (TOMA). Sauceda argues that on July 11, 2000, when the city council met in closed, executive session to discuss the merits of terminating his employment, that it took a "straw vote" or "secret ballot" to terminate his employment, in violation of the TOMA. Sauceda bases this allegation on the fact that the city attorney prepared two letters stating the good cause reasons for his removal as city manager. The first letter states, "In accordance with Section

6B of the employment contract between you and the City of Del Rio, the following is the summary written statement of the majority of the City Council by the Mayor." The second letter is identical to the first, except that the words "of the majority" are deleted. Both letters conclude by stating, "For all of these reasons, the City Council finds there is good cause for your removal." Sauceda claims that these letters show "a deliberation and vote by Council members in executive session contrary to law." The court, however, disagrees.

Under the TOMA, "Every regular, special, or called meeting of a governmental body shall be open to the public." TEX. GOV'T CODE ANN. § 551.002. Texas Government Code section 551.074, however, states that a governmental body is not required to conduct an open meeting "to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee." *Id.* at § 551.074(a)(1). Even so, however, a final action, decision, or vote on a matter deliberated in a closed meeting may only be made in an open meeting held in compliance with the TOMA. *See id.* at § 551.102. An action taken by a govermnental body in violation of the TOMA is voidable. *Id.* at § 551.141.

The court finds that the plaintiff's argument is without merit. The defendants contend, and the court agrees, that there is no summary judgment evidence that the city council voted by straw vote or secret ballot in executive session on July 11, apart from the letters of termination noted above; and these letters, as the defendants also point out, do not evince any illegal votes or ballots having been taken in closed session. Indeed, the defendants point out, and the summary judgment evidence establishes, that two letters of termination

were drafted by the city attorney because she did not know whether the city council would vote to terminate by unanimous or majority decision. The only evidence of a vote to terminate Sauceda as city manager is in the record of the July 11 city council meeting, which shows that the vote to temainate was conducted in open session and, therefore, in compliance with the TOMA.

In *Board of Trustees v. Cox Enterprises,* 679 S.W.2d 86 (Tex. App.- Texarkana 1984), *aff'd in part, rev'd in part on other grounds,* 706 S.W.2d 956 (Tex. 1986), which is cited by both parties, the court of appeals noted that while straw votes and secret ballots in executive session are indeed prohibited under the TOMA, "the Act does not prohibit members in an executive session from expressing their opinions on an issue or announcing how they expect to vote on an issue in the open meeting, so long as the actual vote or decision is made in the open session." *Id.* at 89. *See also Thompson v. City of Austin,* 979 S.W.2d 676, 684 (Tex. App.- Austin 1998, no pet.) (quoting *Board of Trustees v. Cox Enters.*, 679 S.W.2d at 89). Although Sauceda claims that the city council conducted an illegal straw vote or secret ballot in closed, executive session, he presents no summary judgment evidence of anything other than a deliberation behind closed doors, which does not violate the TOMA. Consequently, the court finds that he fails to raise an issue of material fact regarding his TOMA claim. Summary judgment, in other words, should be entered in the defendants' favor.

Freedom of Association

The defendants also move for surmnary judgment on the plaintiff's claim that the defendants violated his First Amendment rights. Sauceda argues that after the city council elections in April 2000 resulted in a change in the majority that had employed him, his political or party affiliation with the minority on the city council which continued to be favorable to him was a motive behind the city council's decision to terminate his employment. In *Steadman v. Texas Rangers,* 179 F.3d 360 (5th Cir. 1999), the Fifth Circuit observed that "... the Supreme Court has never required that an individual 'speak out' in order to find shelter under the First Amendment. Where lower-level government employees have been punished because of their political beliefs and associations, the Court has held that their First Amendment rights were violated." *Id.* at 367. In the present case, however, there is no summary judgment evidence that Sauceda's political or party affiliations played any role in his termination. This is quite different from the factual situation which confronted the court in *Gomez v. City of Eagle Pass,* 91 F.Supp.2d 1000 (W.D. Tex. 2000), which is cited by the plaintiff. In that case, the record established that as a result of 1994 elections in the City of Eagle Pass, a new political majority different from the one that had hired the plaintiff was chosen to govern the city, and the first official act of that new city council was to dismiss the plaintiff as city manager and replace her with a city employee who also happened to be the godfather to one of the newly elected mayor's children. *Id.* at 1002, 1013. In the present case, by contrast, the plaintiff's own deposition testimony refutes his First Amendment claim.

> Q. Okay. Let me ask you now: Now your association with the three minority members has nothing to do with political affiliations, correct - such as party

politics or local party politics, GI forum, United Civic Organization, those types of organizations, correct?
A. That's party politics.
Q. That's what I'm talking about, local politics.
A. No.
Q. I'm talking about national politics - Republican, Democrat- and local politics -GI Form, United Civic Organization.
A. Now ask me the first part of the question.
Q. Did you have any association with the three minority members of the city council through those political organizations?
A. No.
Q. Okay. So you're
A. No...
Q. Okay. So you're not saying that your political rights were infringed because of political associations you had with the three minority members?
A. No.
Q. Okay. And were there any political viewpoints that you expressed that was consistent with political viewpoints of the three minority members that you're claiming that the majority retaliated you against?
A. Such as? Explain.
Q. Abortion, immigration, any types of political viewpoints that you expressed, along with the three members of the minority of the city council, that you felt that you were being retaliated for?
A. Not that I can remember.
Q. Okay. So it's pretty much, as I understand it, the votes that- in general that were now four to three as opposed to before the city council elections when it was five to two, that's what you're saying, right?

A. Yes.

There are, in other words, no issues ofmaterial fact regarding any protected First Amendment speech or conduct that are implicated in Sauceda's termination. Summary judgment should therefore be entered in the defendants' favor.

Defamation

The defendants also move for summary judgment on the plaintiff's defamation claim against Mayor Dora Alcala and Councilman Randy Pohler, which is based on a *Del Rio News Herald* report of July 8, 2000, entitled, "Allegations Surface Against Flo." In that report, both Mayor Alcala and Councilman Pohler confirmed that there had been allegations of sexual harassment against Sauceda which were pending before the city council, and that the sexual harassment investigation report substantiated those allegations. Pohler was also quoted as saying, "I just say [sic] that I would not want my wife or daughter to work under Mr. Sauceda."

The defendants argue, however, and the court agrees, that these statements are not actionable under Texas law. They cite *City of Cockrell Hill v. Johnson,* 48 S.W.3d 887 (Tex. App.- Fort Worth 2001, pet. denied), where the court summarized and applied the law as follows:

> A city is immune from a suit for libel and slander where the alleged defamation occurred in the performance of a governmental function. This same immunity extends to city officials acting in their official capacities. Moreover, comments made to the press by high-ranking governmental officials

concerning personnel matters, such as the reasons for a governmental employee's termination, are absolutely privileged. "When the head of a state executive agency offers an explanation to the press, and hence the public, for the dismissal of employees, he acts within his official duties."

We believe this principle applies equally to the present situation, even though the governmental entity at issue is a city rather than a state agency. Landin, as mayor, and Lowther and Smith, as aldermen and city council members, were charged with governing the City. Thus, they were three of the City's highest ranking officials. The city council was directly responsible for removing Bob from his position as police chief, and Lowther's, Smith's, and Landin's alleged comments to the press[4] were simply an

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[4] As noted in the court's opinion, *see id.* at 897, the specifics of the statements, several of which were printed in two *Dallas Morning News* newspaper articles, were as follows:

> By Lowther: (1) Parker-Jones, Inc., a private investigative firm, was conducting an investigation into possible criminal wrongdoing by Bob; (2) Bob was unqualified and just plain incompetent to hold the position of police chief.
>
> By Smith: (1) Bob was not competent or qualified to serve as chief ofpoliee for the City; (2) Bob was fired because he was incompetent.
>
> By Landin: Bob was not competent to run the police department.

> explanation of the reasons for Bob's dismissal.
>
> As we have noted, the firing of governmental employees is a governmental function. ...[W]e believe the provision of an explanation for the reasons behind the exercise of this governmental function by those directly responsible for it is within the scope of their official duties

Id. at 898 (citations omitted). Such is also the case here. As in *City of Cockrell,* the court concludes that the comments attributed to Alcala and Pohler in the *Del Rio News Herald* article were within the scope of their official duties and were made in their official capacities. Thus, the comments were absolutely privileged and the plaintiff's defamation claim fails as a matter of law. Summary judgment should therefore be entered in the defendants' favor.

Recommendations

(1) Plaintiff, Florencio P. Sauceda's Motion for Partial Summary Judgment (document number 34) should be DENIED.

(2) Defendants' Motion for Summary Judgment and Brief in Support (document number 44) should be GRANTED as to the plaintiff's First Amendment/Freedom of Assocation, Texas Open Meeting Act, and Defamation claims, but DENIED as to the plaintiff's claim for Breach of Contract.

(3) All other pending motions, if any, should be DENIED AS MOOT.

(4) The parties may wish to file objections to these

recommendations. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations contained therein, *see* 28 U.S.C. § 636(b)(1)(C), and shall bar an aggrieved party "except upon grounds of plain error from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.'" *See Douglas v. United Services Automobile Association,* 79 F.3d 1415 (5th Cir. 1996). **The Clerk of the Court shall promptly serve a copy of this report and recommendation on all parties of record by certified mail, return receipt requested.**

Signed on this _____ day of August, 2002.

/s/_____
DENNIS G. GREEN
U.S. MAGISTRATE JUDGE